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OPINION IN THE CIRCUIT COURT OF APPEALS

Bradford Electric Light Co. v. Clapper, 51 Fed. (2d) 992

Brief for Respondent

The action was brought by the respondent, Jennie M. Clapper, as administratrix of the estate of Leon J. Clapper, in the Superior Court for Hillsborough County, against the petitioner, Bradford Electric Light Company, Inc. to recover damages for the death of her intestate alleged to have been caused by the negligence of the petitioner. The case was removed by the petitioner to the District Court, the ground for removal being diversity of citizenship. (*R.* 1). The petitioner pleaded the general issue and filed a brief statement, alleging as a bar to the action a contract based upon the Compensation Act of Vermont. (*R.* 7-8). The respondent filed a motion to reject the brief statement and this motion was granted subject to the petitioner's exception. (*R.* 11). The case was three times tried by jury. At the last trial, a verdict was returned for the respondent on which judgment was entered. This judgment was affirmed by the Court of Appeals, Wilson, J. dissenting.

The petitioning corporation is a public utility organized under the laws of the state of Vermont, and engaged in business in both New Hampshire and Vermont. The respondent's intestate, Leon J. Clapper, was a resident of Vermont. He was employed by the petitioner to do work in either state as circumstances might require. On July 30, 1926, in the course of his employment, he was electrocuted at the petitioner's substation at Haverhill, N. H., because of the petitioner's failure to install and maintain a suitable disconnecting switch. (*R.* 37-38-82-84).

At the trial the petitioner offered to prove that it had accepted the compensation provisions of the Employers' Liability and Workmen's Compensation Act of New Hampshire. Formal proof was waived and it was agreed that the petitioner had accepted the act. (*R.* 66). The employers' liability provisions of the act abolish the defence of assumption of risk and fellow service. Secs. 2, 3, Ch. 178, P. L. By accepting the compensation provisions, the employer is relieved from the enlarged common law liability. The section relating to acceptance is as follows:

"The provisions of sections 2 and 3 shall not apply to any employer who shall have filed with the commissioner of labor his declaration in writing that he accepts the provisions of this chapter as contained in the succeeding sections, and who shall have satisfied the commissioner of his financial ability to comply with its provisions; or who shall have filed with the commissioner a bond, in such form and amount as the commissioner may prescribe, conditioned on the discharge by such employer of all liability incurred under this chapter. Such employer shall thereafter be liable to all workmen engaged in any of the employments specified in section 1 for any injury arising out of and in the course of their employment, in the manner provided in the following sections". Sec. 4, Ch. 178, P. L.

But the compensation provisions expressly reserve to the employee his right of action for damages "at common law or under any statute". The employee may elect after injury whether to take compensation or to bring his suit for damages. In this respect, the provisions of the New Hampshire law are unique, having no parallel among the other compensation acts. The other compensation acts seek to make compensation the exclusive remedy. See Bulletin No. 496, U. S. Labor Statistics. They either provide for election before injury or provide directly that the compensation shall be exclusive. Sec. 11, Ch. 178, P. L., which preserves the right to recover damages, is as follows:

"The right of action for damages caused by any such injury, at common law or under any statute, shall not be affected by this chapter; but in case the injured workman, or in event of his death his executor or administrator, shall avail himself of this chapter, either by accepting any compensation hereunder, by giving the notice hereinafter prescribed, or by beginning proceedings therefor in any manner on account of any such injury, he shall be barred from recovery in every action at common law or under any other statute on account of the same injury."

The petitioner by setting up its acceptance of the compensation provisions had the benefit at the trial of the common law

defences of assumption of risk and fellow service, which otherwise would not have been available to it. Secs. 2, 3 and 4, Ch. 178, P. L.

The principal questions relate to the effect to be given in New Hampshire to the alleged contract based upon the Compensation Act of Vermont. The petitioner maintains that the contract as set out in its brief statement of defense is a complete bar to this action for the death of respondent's intestate occurring while employed in New Hampshire. The respondent's motion to reject the brief statement being in the nature of a demurrer admitted the averments of fact contained in the brief statement. But the case is to be determined upon the entire record. The judgment for respondent may not be vacated if upon examination of the entire record the judgment appears to have been properly entered.

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties." Sect. 391, Title 28, U. S. Code.
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> "The appellee may . . . urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it". *U. S.* v. *Am. Ry. Exp. Co.*, 265 U. S. 425, 435.

THE LAW AND POLICY OF NEW HAMPSHIRE RELATIVE TO INDUSTRIAL ACCIDENTS.

The plaintiff's intestate having received the injuries which caused his death in New Hampshire the rights of the parties depend primarily upon the laws of New Hampshire. *Martin* v. *West*, 222 U. S. 191; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52; *Gould's Case*, 215 Mass. 480. *Saloshin* v. *Houde*, 85 N. H. ——; 155 Atl. 47. The statutes of New Hampshire both as to survival of actions and workmen's compensation are *sui generis*. As between master and servant the common law rules

of liability have been maintained without impairment. In providing for workmen's compensation, the right of the employee, or of his personal representative in the event of his death, to recover damages for the negligence of his employer was preserved.

The statute providing for the survival of actions for wrongful death is not based upon Lord Campbell's act. Secs. 11, 14, Ch. 302, P. L. The measure of damages is not the loss to dependents. *Imbriani* v. *Anderson*, 76 N. H. 491. As originally enacted the statute was quasi penal, and gave rights only as against railroads. The statute provided for the impositions of a fine "not exceeding five thousand dollars nor less than five hundred dollars" for the benefit of the widow or heirs of the deceased. Sec. 14, Ch. 264, G. S. (1867). The penalty was enforced by indictment. *State* v. *Railroad*, 52 N. H. 528.

In 1887 the law was broadened so as to permit the personal representative to institute an action to recover damages against any person or corporation causing death by negligence or other wrongful act. The elements of damage were defined and provision made for their distribution. Ch. 71, L. 1887. The essential characteristics of this statute have been preserved. The elements of damage are "the mental and physical pain suffered by him * * * the reasonable expenses occasioned * * * by the injury * * * the probable duration of his life but for the injury, and his capacity to earn money, * * *" Sec. 12, Ch. 302, P. L. In the event of recovery the damages are to be distributed one-half to the widow or widower and the other one-half to the children of the deceased, and if no widow or children to the heirs of the deceased according to the laws of distribution. Sec. 14, Ch. 302, P. L. A recent case defining some of the distinctive features of this statute is *Holland, Admx.* v. *Morley Button Co.*, 83 N. H. 482:

> "For the satisfaction of the judgment to constitute a discharge *pro tanto* of the employer's obligation it must appear that both the judgment debt and the employer's obligation were in whole or definite part for the same loss or damage and in favor of the same parties. Many of the acts in other jurisdictions give an employer paying compensation

the right to enforce the liability of a third person for the injury to the workman, at least to the extent of the compensation paid. Legislation here to create such a right seems essential, at least in cases where the injuries are fatal. * * *

"It thus appears that persons may share in compensation who do not share in the payment of damages for the tort, and that the division of compensation among those who do share in the payment for the tort is not rigidly proportional. In the equitable division between widow and children totally dependant their varying resources and prospects would be considered. As between a totally dependent widow in poor health and a totally dependant child soon to be able to be self-supporting, for example, the statutory division of the damages for the tort could not fairly be adopted in dividing compensation.

"As to the elements to be taken into account in determining the amount of damage for the tort causing death, they include allowance for pain, expense caused the decedent's estate, and his loss of earning capacity, with limits for the entire amount recoverable. P. L., c. 302, ss. 12, 13. Compensation payable in case of death is the amount of wages not above a fixed limit which would be earned in a fixed period when the dependency is total and proportionately thereto when it is partial. P. L., c. 178, s. 19."

See also: *Imbriani* v. *Anderson*, 76 N. H. 491.
Dillon v. *Railway*, 73 N. H. 367.
Davis v. *Herbert*, 78 N. H. 179.

The results in *Holland, Admx.* v. *Morley Button Co., supra*, are opposed to the law in most jurisdictions, but entirely sound. The decision serves to emphasize some of the distinguishing features of the local statute providing for the survival of actions. Decisions from other jurisdictions might aid but would scarcely control in its interpretation. Likewise in the development of workmen's compensation New Hampshire has not followed the general trend. The local compensation act adopted in 1911 is administered by the courts and the employee is permitted after injury to choose between compensation and his common law

right of action for damages. The great majority of workmen's compensation acts are administered by commissions. All other compensation acts provide either directly or indirectly for the elimination of suits for damages usually by requiring election of remedies before injury. New Hampshire recognizes that compensation does not compensate the injured employee for his loss. The right of the employee to recover his entire loss when his injury is due solely to the negligence of his employer has been maintained. Under the New Hampshire system the benefits of compensation are assured to the employee and the inflexibility and injustice of an exclusive system of compensation largely eliminated. As a consequence, most of the claims arising out of industrial accidents are adjusted on an equitable basis without litigation. The legislature of New Hampshire has repeatedly refused to abolish the right of election after injury.* The differences in policy between New Hampshire and the other states are such that the rights of the parties to this action may not properly be determined by decisions from other jurisdictions.

The decision in this case is conformable to the law and policy of New Hampshire as established by its legislature and declared by its Court. In considering this case, we are confronted by the petitioner's attempt to avoid the consequences of its acceptance of the compensation provisions of the New Hampshire act. The petitioner, in setting up its acceptance of the compensation provisions of the New Hampshire act, took a position inconsistent with its brief statement. At the trial the petitioner claimed that the rights of the parties were controlled by its acceptance of the New Hampshire act and its contention became the law of the trial. By proving its acceptance of the compensation provisions, the petitioner had the benefit of the defenses of assumed risk and fellow service, (*R.* 66-100), which otherwise would not

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* Among the compensation measures abolishing the right of election after accident which have been rejected, are the following: 1915 Session, House Bills No. 206, 302, Journal, 720, 1021; 1917 Session, House Bills No. 319, 485, Journal, 567, 568; 1919 Session, House Bill No. 134, Journal, 437; 1927 Session, House Bill No. 212, Journal, 752; 1929 Session, House Bill No. 292, Journal 752. The bills rejected in 1927 and 1929 were modeled after the Vermont law. In 1923 the Compensation Act was amended to increase the compensation (Ch. 91, Laws of 1923) and in 1925 the Compensation Act as amended was re-enacted without change. (Ch. 178, P. L.)

have been available to it. Sec. 2 and 3, Ch. 178, P. L. Having set up its acceptance of compensation and obtained the benefit of it in this action, the petitioner ought not to be heard to assert that the acceptance did not extend to the respondent's intestate when electrocuted. The legal consequences naturally attaching to the petitioner's acceptance are not enlarged, if the petitioner is held to the law of the trial. The acceptance was unlimited. It included all of the petitioner's employees, (*R.* 66) *Cox's Case* 225 Mass. 220. In accepting the compensation provisions, the petitioner agreed "thereafter (to) be liable to all workmen engaged in any of the employments specified in section 1 for any injury arising out of and in the course of their employment, in the manner provided in the following sections." Sec. 4, Ch. 178, P. L.

The respondent's action was brought in pursuance of and "in the manner provided in the following sections." Sec. 11, Ch. 178, P. L. Consequently, the petitioner's acceptance of the compensation provisions of the New Hampshire act is necessarily an important factor in determining the rights of the parties. In deciding the case, the Court of Appeals said, Anderson, J.:

> "On rehearing, the attention of the court is sharply directed to the fact that the defendant expressly accepted the New Hampshire Workman's Compensation Act, — P. L. N. H. c. 178. This Act reserves, in section 11, to the employee or his legal representative, an action at law for damages or death caused by negligence. It is clear that this Act applies to actions for negligence occurring in New Hampshire, and that its acceptance binds the defendant in this action of tort. We are also satisfied that we were in error in our previous holding; and that no contract made in Vermont purporting to release an employer from liability for future negligence can bar an action brought in New Hampshire for an injury there sustained and thus change the public policy of New Hampshire. See *Saloshin, Adm'x.* v. *Houle* (N. H.), decided May 5, 1931. It follows that on both grounds the former decision of this court must be reversed." (*R.* 145).

A CONTRACT INTENDED TO EXEMPT THE EMPLOYER FROM LIABILITY FOR NEGLIGENCE IS AGAINST THE PUBLIC POLICY OF NEW HAMPSHIRE AND INVALID.

In sustaining the respondent's motion to reject the brief statement, the district court, Morris, J., held that "actions under the Employer's Liability Act of New Hampshire are based on tort not on contract and the law of Vermont has no extra-territorial effect". (*R.* 12). In holding that the common law liability of the employer had not been abrogated, proper consideration was given to the history and development of the local system for the protection of employees from the consequences of industrial accidents. The general policy as to the application and enforcement of foreign law in redressing local wrongs was recently declared by the Supreme Court of New Hampshire in *Saloshin* v. *Houle;* 85 N. H.—; 153 Atl. 47.

> "It is sought by the transfer of the case to have it here determined what effect the plaintiff's acceptance of compensation in New York had upon the action. The answer depends, first, upon the policy of comity in enforcing the laws of other states, and second, if comity may be invoked, upon the New York law relating to and regulating compensation. As the record is understood, the plaintiff as the decedent's widow is the sole beneficiary of the action under P. L. c. 302, s. 14, II. It does not appear that there are minor or dependent children to share with her in any recovery. However the New York law is to be construed, comity in its recognition and enforcement would not go so far as to permit it to defeat local law. Conduct of the plaintiff which sought to divest beneficiaries of their interest without their consent and enured solely to her benefit would be regarded as illegal here. A legal character of the conduct in the state of the domicile will be given no effect here when to do so tends to alter the local law. Local jurisdiction over the action gives jurisdiction over its proceeds, and hence over their disposal. Nor may the New York law give the insurer any right of action, independent of that of the plaintiff,

which may be enforced here. That law may not displace or modify the local law in its effect upon local occurrences and transactions. As to them, the local law will recognize no liability except that which it itself imposes. Otherwise local sovereignty would be impaired. It follows that if the New York law might be construed as giving the insurer a right of action of its own distinct from that of the plaintiff, it could not be maintained here. And it also follows that the amount of recovery in the local action cannot be affected by foreign law. The rule of damages is no less immune to change than that of liability. But since the plaintiff was personally subject to the laws of New York, her conduct pursuant thereto is to be recognized here so far as local laws and policy are not disregarded."

It is asserted "that compensation acts are not contrary to the public policy." (*R.* 148). But in so far as this may be true the result has been attained by legislative action. At common law contracts intended to relieve the employer from liability from future negligence are invalid. *Piper* v. *Railroad*, 75 N. H. 228, 435; *Johnston* v. *Fargo*, 184 N. Y. 379. The reasonableness of the consideration does not enter into the determination of the validity of such agreements. Consequently, agreements embodying compensation principles have been held valid only if they preserve to the employee "the right to elect whether he will sue his employer or accept benefits from the association." *C. B. & Q. Railroad* v. *Miller*, 76 Fed. 439.

And in *Twaits* v. *Pennsylvania R. R. Co.*, 77 N. J. Eq. 103, the law was stated as follows:

"... The law forbids and therefore treats as invalid a contract between an employer and employee which absolves the employer from responsibility for his own negligence. This contract entered into between Twaits, an employe of the Pennsylvania Railroad Company and the relief department, would come under this ban and be invalid were it not for the fact that after an accident the employe is left free either to sue the company or accept the benefits accruing to him by reason of his membership in the relief department.

"Such is the construction placed upon this contract by our own and many other courts . . ."

See also *Day* v. *Atlantic Coast Line R. Co.* 179 Fed. 26; *Johnson* v. *Philadelphia & Reading R. R.*, 163 Pa. 127; *Otis* v. *Pennsylvania Co.*, 71 Fed. 136. Labatt: Master and Servant, (2nd ed) Sect. 1921.

Among the first of the compensation laws to be enacted was that of New Hampshire. It adopted rudimentary principles and recognized the legal tests applied to the benefit systems by giving to the employee the right to elect after injury whether to bring his action for damages or to accept compensation. *Gordon* v. *Company*, 83 N. H. 221. Therefore, the statute takes nothing from the common law rights of the employee. On the contrary, in expressly guaranteeing to the employee his right to bring his action for damages, the rules of the common law were reaffirmed. Among them was the rule that any contract or agreement exempting the employer from liability is invalid.

It is claimed that the alleged contract based on the Vermont compensation act being valid where made ought to be enforced in New Hampshire. In determining whether such a contract ought to be enforced in New Hampshire, a fair test is to inquire whether such a contract if made in New Hampshire would be valid. It is plain that such a contract if made in New Hampshire would not be enforcible. *Piper* v. *Railroad, supra; Conn* v. *Company*, 79 N. H. 450; *Wessman* v. *Railroad*, 84 N. H. 475, 152 Atl. 476.

No principle of comity requires the enforcement of a contract which is against the public policy of the state where the contract is to be performed and which would be unlawful if made therein. *Piper* v. *Railroad, supra.*

The New Hampshire Employers' Liability and Workmen's Compensation Act applies to certain hazardous employments. It applies to all employees and all employers engaged in those employments. No distinction based upon the place of hire is recognized. The purpose of this legislation is preventative as well as remedial. The enlarged liability has a tendency to reduce industrial accidents. If the employee were permitted by contract to

exempt the employer from his liability for negligence, this purpose might be defeated. The situation is similar to that arising under the federal laws relating to the safety of employees of railroads. Contracts intended to relieve the railroad from the obligations imposed by these laws have been regarded as against public policy. In a leading case, *Philadelphia, B. & W. Railroad Co.* v. *Schubert*, 224 U. S. 603, the court (Mr. Justice Hughes) said:

> "In speaking of the act in question, this court said that 'the natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged,' there was no doubt that 'in making those changes Congress acted within the limits of the discretion confided to it by the Constitution'. Second Employers' Liability Cases, supra, p. 50. (223 U. S. 51, 32 Sup. Ct. Rep. 175, 56 L. Ed. 169). If Congress may compel the use of safety appliances (*Johnson* v. *Southern Pac. Co.*, 196 U. S. 1, 17 Am. Reg. Rep. 412, 25 Sup. Ct. 158, 49 L. Ed. 363), or fix the hours of service of employees (*Balt. & O. R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878), its declared will, within its domain is not to be thwarted by any previous stipulation to dispense with the one or to extend the other. And so, when it decides to protect the safety of employees by establishing rules of liability of carriers for injuries sustained in the course of their service, it may make the rules uniformly effective. These principles, and the authorities which sustain them, have been so lately reviewed by this court that extended discussion is unnecessary."

For similar reasons the attempts to extend state compensation laws to accidents subject to maritime law have failed. In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 216 it was held that the compensation law of New York was as to maritime accidents, invalid. The Court said:

"And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself."

See also: *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149. *Washington* v. *Dawson & Co.*, 264 U. S. 219.

The respondent's action sounds in tort. It is well settled that actions for tortious wrongs are controlled by the law of the place of injury. *Gould's Case*, 215 Mass. 480. The laws of New Hampshire provide that the employer shall respond in damages for negligence causing the death of his employee. The contract based upon the laws of Vermont offered as a bar is opposed to the law as declared by the Supreme Court of New Hampshire (*Piper* v. *Railroad*, supra) and reaffirmed by its legislature. The ruling rejecting the brief statement was based upon a clear appreciation of the law and policy of New Hampshire.

Among the numerous cases cited by the petitioner, *Barnhart* v. *American Concrete Steel Company*, 227 N. Y. 531, alone presents a comparable situation. In that case the plaintiff's intestate and the defendant were both domiciled in New Jersey and subject to the provisions of its Compensation Act. The plaintiff's intestate was killed in New York. There was no evidence that the defendand had localized its business in New York. The Constitution of New York had then been amended to permit compulsory workmen's compensation. Consequently, the court held that the rights of the parties were controlled by the compensation law of New Jersey. The result would probably have been quite different but for the changes in policy introduced by the amendment to the Constitution. *Johnston* v. *Fargo*, 184 N. Y. 379. And cases from jurisdictions where the common law action has virtually been abrogated by the Compensation Acts are of no real value because in New Hampshire the common law action has been preserved.

THE ALLEGED CONTRACT BASED UPON THE VERMONT ACT WAS SUPERSEDED BY AN AGREEMENT BASED UPON THE LAWS OF NEW HAMPSHIRE.

Even if the alleged contract, based upon the Vermont Compensation Act, were valid in New Hampshire, there still remains the question whether the contract may not have been superseded by a new agreement. In Vermont, the provisions of the Compensation Act were made a part of the contract of hiring, unless the employer or employee gave written notice that its provisions were not to apply. (*R.* 8). But the laws of Vermont can have no extra-territorial effect. In New Hampshire the parties were free to modify this contract. The petitioner maintained a large portion of its distribution system in New Hampshire and might properly bring its men when at work there under local law. The petitioner, by written declaration, accepted the compensation provisions of the Employers Liability and Compensation Act of New Hampshire. "Such employer shall thereafter be liable to all workmen engaged in any of the employments specified in Sect. 1 for any injury arising out of and in the course of their employments in the manner provided in the following sections:" Sec. 4, Ch. 178, P. L. The respondent's intestate when injured was engaged in one of the specified employments. This action is brought by respondent as authorized by "the following sections". See, Secs. 11, 12, Ch. 178, P. L.

The petitioner's acceptance, at the least, was an offer to its employees injured in New Hampshire to pay compensation or to respond in damages according to the provisions of the Compensation Act. This offer was accepted by the respondent. The election of both parties to have their rights determined by the laws of New Hampshire, constituted an agreement superseding the alleged contract, based upon the Compensation Act of Vermont. The parties omitted no act necessary to have their rights determined by the laws of New Hampshire.

If application of the local law under circumstances similar to those disclosed by the present case is to be denied, there will be much confusion and uncertainty injected into an important branch of the law. The petitioner did everything required by the law of New Hampshire to bring its men at work within the state under

the provisions of the New Hampshire Compensation Act. The rule asserted by the petitioner would deny to an employer doing business in two or more states, the right to localize his business and establish a uniform rule of liability in each state. For instance, if an employer doing business principally in Vermont should undertake highway or other construction work in New Hampshire, and should take his workmen from Vermont to New Hampshire, the rights of the parties, in the event of injury, would be determined according to the law of Vermont, even though the employer accepted the provisions of the New Hampshire Compensation Act and insured his workmen thereunder. Such results are opposed to sound policy and the great weight of authority. The theory that the compensation law of the place of hire determines the rights of parties must not be extended so far as to deny the employer and employee the right to modify the contract when the parties enter another jurisdiction. Moreover, it is not the contract of hire, but the relation arising therefrom upon which the law should operate. The obligation to pay compensation arises out of the relation of master and servant rather than out of the contract by which that relation is created. The relation is brought into existence from day to day as the service is performed. Consequently, when the employer and employee both enter another state, there is no sound reason why the law there should not determine the obligations arising out of the relation of master and servant.

In *American Radiator Co.* v. *Rogge*, 86 N. J. L. 436, 439, it appeared that Rogge was employed in New York and injured in New Jersey. It was held that the rights of the parties must be determined according to the law of the place of injury. The court said:

> "The liability of the employer to make compensation is an obligation superimposed upon the original contract as a condition of its performance in New Jersey, and it is contractual in character because either party may escape the obligation by giving notice that he will not be bound thereby, and because it does not arise out of any wrongdoing. But the addition of this contractual obligation by statute does not affect the contract of hiring; that is still enforced as far as it goes by its terms."

In *Douthwright* v. *Champlin*, 91 Conn. 524, an action to recover compensation, it appeared that the contract of hire was made in Massachusetts and that the claimant was injured in Connecticut. The court held that the Connecticut Compensation Act applied and said:

> "The express acceptance of our Act by these parties added its compensation features to their contract. In the absence of their refusal, the law would have added this to their contract; in either case it would have become a part of the contract."

In *American Mut. Liability Ins. Co.* v. *McCaffrey et al.* 37 Fed. (2d) 870, certiorari denied, 281 U. S. 751, it appeared that the Chattanooga Boiler & Tank Company was a Tennessee corporation engaged in the manufacture of tanks used by oil companies. It undertook to erect a tank in Texas. McCaffrey was employed in Tennessee. He was sent to Texas to assist in the erection of the tank and while there injured. The Tank Company accepted the provisions of the compensation act of Texas by becoming a subscriber for insurance. In holding that the case was controlled by the Texas compensation act the court said:

> "In view of what plaintiff alleges as to the time and place of his employment, the admission with respect to his employer having become a subscriber for insurance under the statute, and the defendant insurance company having assumed the liability plus the showing that the claim was made and prosecuted before the Industrial Board, we think it conclusively established that he comes under the Texas law."

In *Carl Hagenback & Great Wallace Show Co.* v. *Randall*, 75 Ind. App. 417, 126 N. E. 501, it appeared that one Randall was employed in Ohio by a written agreement. The agreement provided that "all matters whether sounding or in tort, relating to its validity, construction, and interpretation be determined" according to the laws of the District of Columbia. Randall was killed in Indiana and his mother filed a petition for compensation. In holding that the rights of the parties must be determined by the law of Indiana the court said:

"The Workmen's Compensation Act of this state (sections 2-4, 15, Acts 1915) specifically provides that every employer in the state is presumed to have accepted the provisions of the act, and to have agreed to be bound thereby, unless such employer, 30 days before the accident resulting in injury or death, shall have given notice of exemption, and that no contract can operate to relieve any employer of any obligation created by the act. It is not contended that appellant gave the required notice, or any notice whatever. Appellant's show and show train were brought into Indiana, and appellant's business was being conducted in Indiana, just as had been contemplated by the parties at the time the employment contract in question was executed, and Randall, at the time of his death, was in the line of his employment as provided by such contract. Under such circumstances the public policy of Indiana as established by her compensation law did not give way because the contract of employment had been made in Ohio. Appellant's obligation under the Indiana act was superimposed upon the Ohio contract as a condition of its performance in this state. Appellant could not relieve itself of the statutory obligation by a foreign contract. The one way of exemption was by notice as provided by the Act."

And in *Johns-Manville, Inc.* v. *Thrane*, 80 Ind. App. 432, the evidence established that Johns-Manville, Inc., a foreign corporation, was performing work at Rochester, Indiana, under a contract with Armour & Company. It accepted the workmen's compensation act of Indiana "by insuring its compensation liability covering the work it is performing for said Armour & Company." In the course of the work Thrane was killed. He was a resident of Illinois and was there originally employed by Johns-Manville, Inc. He was sent in to Indiana to assist in the work being done there. In holding that the case was controlled by the compensation act of Indiana the court said:

"Appellant challenges the Industrial Board's finding that appellant was an Indiana employer, and that the deceased was an Indiana employee as wholly unsupported by the evi-

dence. An examination of the evidence discloses that the deceased was first employed for work in the city of Chicago, Illinois, at a wage of sixty-eight and one-half cents per hour. At this time there was nothing said about his going to Indiana. Later, he was sent to Indiana, where he worked under the direction of a local boss. The record is silent as to the amount that he was to receive as wages, though he was paid for his services, and in addition to his wages in money he was furnished room and board. The contract, express or implied, under which he was working at the time of his injury was different from the one under which he served in Chicago, and, whether made in Illinois or in Indiana, was made in contemplation of performance in Indiana, and as such was subject to the Workmen's Compensation Act of Indiana. The facts as disclosed by the evidence fully justified the board's finding that appellant was an Indiana employer, and the deceased an Indiana employe. Appellant relies upon the case of *Darsch* v. *Thearle Duffield, etc., Co., supra,* for reversal, but the case is readily distinguished from the instant case. In that case the employer had not localized itself, or qualified to do business in the state, and, as far as the record shows, had no place of business in the state. It had not in any manner accepted the provisions of the Workmen's Compensation Act. The injured employe had been working in Illinois under an Illinois contract of employment, and as an incident of his contract was temporarily in this state. It did not there appear that the contract of employment contemplated service in Indiana."

See also: *Smith* v. *Heine Safety Boiler Co.,* 119 Me. 552. *Ocean Accident & Guarantee Corp.* v. *Industrial Commission,* 32 Ariz. 265. *Johnson* v. *Nelson,* 128 Minn. 158. *Mitchell* v. *St. Louis Smelting & Refining Co.,* 202 Mo. App. 251. *Ginsburg* v. *Byers,* 171 Minn. 366.

Of course unanimity among the authorities is lacking, but many of the cases are distinguishable because of essential differences in the facts. The rule enunciated in the foregoing cases applies when the employer is doing business within the state. The qualification of the rule appears in the case of *Norman* v. *Hartman*

Furniture and Carpet Company, 84 Ind. App. 173. There one Norman was a buyer employed by the defendant, a corporation under the laws of Illinois and having its principal place of business at Chicago and carrying on no business in Indiana. Norman, in the course of his employment was killed in an automobile accident in Indiana. In holding that the widow's claim did not come within the Indiana Compensation Act the court said:

> "Appellant has filed an able and exhaustive brief, and claims that on the authority of *Darsch* v. *Thearle Duffield, etc., Co.* (1922), 77 Ind. App. 357, 133 N. E. 525, the award should be reversed. In the case cited, the facts were: That both parties were residents of the State of Illinois; that the contract of employment between the parties was entered into in the State of Illinois; that appellant was an Illinois corporation and had no office or place of business in the State of Indiana; that at the time of the injury the employee was only temporarily in Indiana, and the court there affirmed an award dismissing the claim for want of jurisdiction. We adhere to that decision.
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> "In the instant case the agreed statement of facts shows that appellant and appellee were residents of Chicago, Illinois, and that the contract of employment was entered into in Illinois; that appellee had not localized in Indiana, and that Raleigh H. Norman, at the time of his injury and death, was in Indiana, temporarily engaged in his master's business."

The Indiana decisions go far toward solving the difficult problems presented by this phase of the conflict of laws. Under the Indiana decisions a non-resident employer entering the state to do business is regarded as an Indiana employer when he has localized his business and taken the steps necessary to bring his workmen under the compensation act. Under these circumstances, the place of hire is regarded as immaterial and the rights of the employee injured in the course of the business are determined by the law of the place where the injury occurred. In such situation under the contract theory it may fairly be held that the parties have evinced a purpose to have their rights determined according

to the law of the place where the work is being done. But where the employer has no place of business in Indiana and his employee is merely casually there, then the Indiana Compensation Act is held not to apply. Here, according to the contract theory, there is no basis for holding that the parties have adopted the law of the place of injury.

If the present case is to be controlled by the contract theory no element is lacking to establish the respondent's right to maintain her action. The petitioner having a localized business in New Hampshire, by written declaration accepted the compensation provisions of the Employers' Liability and Workmen's Compensation Law. This was an unequivocal offer to compensate in accordance with those provisions employees injured in New Hampshire. The injury and the death of respondent's intestate occurred in New Hampshire while he was in an employment subject to those provisions and the respondent has elected to bring this suit in pursuance thereof. The petitioner's offer and the respondent's acceptance constitute a binding agreement to submit their rights for determination according to the laws of New Hampshire.

We respectfully submit that the judgment for the respondent ought to be affirmed.

Respectfully submitted,

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